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Supreme Court Vacancy: What's at Stake for Abortion

The Administration is refusing to work on relief for Americans facing hunger, record unemployment, and evictions so that it can push through Judge Barrett's nomination in the middle of an election and a pandemic. The Senate must stop this sham nomination process and focus on the relief and care the country needs.

For more than 45 years, the Supreme Court has recognized the fundamental constitutional right to decide to have an abortion. But that fundamental right is on the line with the current Supreme Court vacancy. Justice Ginsburg's replacement will determine whether the right to abortion is respected or destroyed.

President Trump has promised to nominate only Supreme Court justices who would get rid of the right to abortion. He has already delivered with two Justices who disregarded longstanding precedent and voted against abortion rights after joining the Court.[1] If the Senate pushes forward with this illegitimate process and confirms Trump's nominee Amy Coney Barrett to the Supreme Court, Trump's promise will come to pass.

The Court could overturn *Roe v. Wade* or eviscerate it completely without formally overruling it. Either way, the outcome would be devastating to individuals and families across the country.

The Supreme Court Could Have an Opportunity to Eviscerate or Even Possibly Overrule Roe in the Near Future

The threat to the right to abortion is not hypothetical. Two cases are already at the Court's doorstep, awaiting the Court's decision whether to review.[2]

- *Jackson Women's Health Org. v. Dobbs*: After the Mississippi legislature passed a law banning abortion as early as 15 weeks of pregnancy and threatening abortion providers with criminal charges, a federal court struck it down as unconstitutional.[3] The state has appealed the case to the Supreme Court, asking the Court explicitly to dismantle Roe v. Wade.[4]

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- *American College of Obstetricians & Gynecologists v. U.S. Food & Drug Administration*: After a federal court agreed to lift a restriction on abortion access during the COVID-19 pandemic, the Trump Administration appealed the decision to the Supreme Court.[5] The Trump Administration is asking the Court to reinstate a federal requirement that forces patients seeking medication abortion to make a medically unnecessary in-person visit to obtain this medication, risking COVID-19 exposure.[6] The Supreme Court has now punted the case back to the district court until after the election, but the case ultimately remains in the Court's hands.[7]

Over a dozen cases that threaten to nullify the constitutional right to abortion are in the circuit courts—just one step away from the Supreme Court.[8] These cases include:

- *Bans on abortion at a specific point in pregnancy*.[9] These laws squarely challenge a fundamental tenet of the constitutional right to abortion—that states may not set a particular point at which viability begins[10] and that they cannot ban abortion before that point.

- *Bans on abortion based on the patient's supposed reasoning*. These laws ban abortion based on why the person is seeking an abortion, such as a fetal diagnosis or the race or sex of the fetus.[11]They are intended to whittle away at the right to abortion by inquiring into a person's private medical decisions and also directly challenge the core constitutional principle that states may not ban abortion before viability.[12]

- *Bans on a safe and common method of abortion*. States are passing laws that ban a particular abortion procedure. If the Supreme Court were to uphold one of these bans—which so far have been struck down as unconstitutional[13] —it would effectively eliminate one of the most common methods of safe abortion care.

- *Medically unnecessary and burdensome restrictions on abortion providers*. States are passing laws designed to make it difficult or impossible for abortion providers to provide care.[14] Although the Supreme Court recently struck down Texas and Louisiana clinic shut-down laws, state legislators and hostile federal judges continue to test the boundaries of those decisions.

- *Laws designed to dissuade people from having an abortion*. Politicians continue to pass laws designed to shame and stigmatize people who have decided to have an abortion and prevent them from accessing care.[15]

With a new anti-abortion Supreme Court justice, any of these cases could present a newly-constituted Supreme Court with an opportunity to overturn *Roe v. Wade* or render it meaningless. If the Supreme Court overturned *Roe*, at least twenty states are poised to immediately seek to ban abortion.[16] And without *Roe*, an anti-abortion Congress and President could pass a nationwide federal ban on abortion.

But the Supreme Court doesn't have to overrule *Roe* outright to eliminate abortion access. Instead, the Court could claim to uphold *Roe* but change the contours of the right to abortion and allow every abortion restriction that comes before it to stand, leaving the right to abortion a right in name only.

Trump's Nominee Amy Coney Barrett Will Provide a Fifth Vote to Eviscerate the Right to Abortion

President Trump's nominee Amy Coney Barrett would provide a fifth vote to eviscerate the constitutional right to abortion. She has made her position against abortion clear, signing an anti-abortion ad in 2006 that called for the end to Roe v. Wade and calling the decision "barbaric."[17] In 1998, she wrote that abortion is "always immoral."[18] Her record as a judge demonstrates that she would permit a range of restrictions on abortion, including pre-viability abortion bans, that directly contradict current Supreme Court precedent, including *Roe v. Wade, Planned Parenthood v. Casey, and Whole Woman's Health v. Hellerstedt*.[19] Judge Barrett's record also indicates a willingness to change longstanding precedent that she does not agree with: in a 2013 article prior to becoming a judge, she was critical of *Roe v. Wade* and wrote that in her view, it is legitimate for justices to overturn precedent if it does not match their interpretation of the Constitution.[20]

Chief Justice Roberts Will Not Save Abortion Rights

If Amy Coney Barrett is confirmed to the Court in place of Justice Ginsburg, there will be a majority of justices on the Supreme Court who oppose abortion rights and are poised to begin rolling back the constitutional right to abortion, if not overruling it outright. Chief Justice Roberts is not necessary for that majority, but even if he was, there is no reason to think he will save the right to abortion. Although he joined the majority decision to strike down an abortion restriction in *June Medical Services v. Russo*, that was only because he had to – he was bound by the Court's decision in *Whole Woman's Health* just four years earlier that struck down an identical law.[21]

Prior to *June Medical*, Chief Justice Roberts voted against abortion rights at every opportunity.[22] And in his *June Medical* opinion, Chief Justice Roberts made clear that he continues to disagree with *Whole Woman's Health*, and he provided a roadmap for how abortion opponents can bring a different case that will allow the Court to eviscerate *Roe*. Shortly after the *June Medical* decision, the Eighth Circuit Court of Appeals put Chief Justices Roberts' words into effect: it cited Chief Justice Roberts when it reversed a lower court's decision to block four Arkansas anti-abortion laws.[23] If Amy Coney Barrett were confirmed, there's every reason to believe there will be a 6-3 majority in favor of gutting the right to abortion, and that she will help lead the Court in quickly moving to do so.

Overturning or Further Eroding *Roe* Will be Devastating

Already, the right to abortion is meaningless for many people, due to the overwhelming number of existing anti-abortion laws and Supreme Court decisions that have chipped away at it. This is especially true for people of color, those struggling financially, LGBTQ people, young people, and those in rural communities. A newly-constituted Court's further incursions on the right to abortion could allow anti-abortion politicians to create and exacerbate harmful barriers that delay access, increase costs, shame and stigmatize individuals seeking abortion, close clinics, and ultimately put abortion out of reach for even more people.

Losing access to abortion will have a profoundly devastating impact on all aspects of people's lives, especially Black and brown communities who already face systemic racism. Studies show that being denied an abortion has a substantial impact on people's economic security, equality, and ability to pursue their own life's path.[24] As the Court itself has recognized, "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[25]

Conclusion

The threat to abortion rights is clear in the wake of Justice Ginsburg's death. A longstanding fundamental right—a right that has allowed people to make their own decisions about their health, families, lives, and futures—hangs in the balance. Only nominees who commit to respecting and upholding the fundamental right to abortion should be considered for the Court—and only after the next President is sworn in.

1 *See June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103 (2020).

2 Two cases that could have major repercussions for abortion access are also at the Court's doorstep awaiting its decision whether to review: *American Medical Association v. Azar* and *Azar v. Mayor and City Council of Baltimore*. These cases present a split between circuit court decisions involving a 2019 Trump Administration rule that imposed devastating changes on the Title X family planning program, such as preventing family planning providers from providing full information to patients about all reproductive health care options including abortion. Pet. for Cert., *Am. Med. Ass'n v. Azar*, No. 20-429 (S. Ct. docketed Oct. 5, 2020); Pet. For Cert., *Azar v. Mayor & City Council of Balt.*, No. 20-454 (S. Ct. docketed Oct. 8, 2020).

3 *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019).

4 *Pet. for Cert., Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (S. Ct. docketed June 15, 2020).

5 *Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin. ("ACOG v. FDA")*, No. 20-1824 (4th Cir. Aug. 13, 2020), Doc. No. 30 (denying motion for stay of injunction pending appeal); *ACOG v. FDA*, No. CV TDC-20-1320, 2020 WL 3960625 (D. Md. July 13, 2020) (granting injunction)

6 App. for Stay Pending Appeal, *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, No. 20A34 (S. Ct. Aug. 26, 2020).

7 *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, No. 20A34, 592 U.S. __ (Oct. 8, 2020).

8 Additionally, there are cases that do not directly challenge core holdings of Roe v. Wade but will affect abortion access that are also working their way through the courts. Specifically, these cases concern whether states may prohibit abortion providers from participating in Medicaid or other health funding programs or whether family planning centers can provide people with full information about reproductive health care, including abortion. See, e.g., *Planned Parenthood Se., Inc. v. Snyder*, No. 16-60773 (5th Cir. docketed Nov. 21, 2016) (appealing injunction against Mississippi law barring Medicaid patients from receiving coverage for care from providers who also provide abortion); *Planned Parenthood Gulf Coast v. Russo*, No. 18-30699 (5th Cir. docketed June 8, 2018) (challenge to Louisiana's inaction on Planned Parenthood application for license to operate abortion facility and prohibition on Medicaid patients receiving coverage for care at facilities that provide abortion); overruling injunction against Mississippi law barring Medicaid patients from receiving coverage for care from providers who also provide abortion); *Planned Parenthood of Greater Tex. v. Phillips*, No. 17-50282 (5th Cir. docketed Apr. 4, 2017) (appealing injunction against South Carolina law barring Medicaid patients from receiving coverage for care at Planned Parenthood health centers).

9 *Jackson Women's Health Org.*, 945 F.3d 265 (affirming district court ruling that Mississippi 15-week ban is unconstitutional), *cert. pet. filed*, No. 19-1392 (U.S. June 15, 2020); *Memphis Ctr. for Reprod. Health v. Slatery*, No. 3:20-cv-00501, 2020 WL 3957792, (M.D. Tenn. July 13, 2020) (granting temporary restraining order blocking abortion ban at multiple points in pregnancy), *appeal filed*, No. 20-5969 (6th Cir. Aug. 24, 2020); *Bryant v. Woodall*, 363 F. Supp. 3d 611 (M.D.N.C. 2019) (holding North Carolina 20-week abortion ban unconstitutional), *appeal filed*, No. 19-1685 (4th Cir. June 26, 2019); *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213 (E.D. Ark. 2019) (holding Arkansas 8-week abortion ban unconstitutional), *appeal filed*, No. 19-2690 (8th Cir.)

10 The U.S. Supreme Court has said that state legislatures may not draw a line at a particular gestational age to establish viability because viability is a matter of judgment of the attending physician. See, e.g., *Cent. Mo. v. Danforth*, 428 U.S. 52, 64–65 (1976).

11 *Memphis Ctr. for Reprod. Health*, 2020 WL 3957792 (granting temporary restraining order blocking ban on abortions supposedly based on fetal sex, race, or diagnosis), *appeal filed*, No. 20-5969 (6th Cir.); *Preterm-Cleveland v. Himes*, 940 F.3d 318, 320 (6th Cir. 2019) (affirming lower court's decision to block an Ohio law which threatened abortion providers with criminal charges for performing an abortion if there was a possibility it was based on a certain fetal disability diagnosis), *opinion vacated and reh'g en banc granted*, 944 F.3d 630 (6th Cir. Dec. 13, 2019); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 302 (7th Cir.) (affirming lower court's ruling that Indiana ban on abortions based on sex or disability is unconstitutional), *reh'g en banc granted and judgment vacated on other grounds*, 727 F. App'x 208 (7th Cir. 2018); *and cert. denied in relevant part sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019); *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213 (E.D. Ark. 2019) (holding unconstitutional an Arkansas law which threatens abortion providers with criminal charges for performing an abortion if there was a possibility it was based on a certain fetal disability diagnosis), *appeal filed*, No. 19-2690 (8th Cir.).

12 *See, e.g., Planned Parenthood of Ind. & Ky., Inc.*, 888 F.3d at 306 ("The provisions prohibit abortions prior to viability if the abortion is sought for a particular purpose. These provisions are far greater than a substantial obstacle; they are absolute prohibitions on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State.").

13 *Hopkins v. Jegley*, 267 F. Supp. 3d 1024 (E.D. Ark. 2017), *as amended*, No. 4:17-CV-00404-KGB, 2017 WL 6946638 (E.D. Ark. Aug. 2, 2017) (ruling the D&E ban and three other abortion restrictions unconstitutional and blocking the laws), *vacated and remanded*, 968 F.3d 912 (8th Cir. 2020); *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785 (6th Cir. 2020) (affirming lower court ruling that D&E ban is unconstitutional); *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938, 954 (W.D. Tex. 2017) (holding Texas' D&E ban unconstitutional), appeal filed, No. 17-51060 (5th Cir. 2017).

14 *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (upholding Indiana law requiring burial or cremation of fetal tissue); *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606 (W.D. Tex. 2018) (striking down a Texas law requiring fetal tissue to be buried or cremated), *appeal filed*, No. 18-50730 (5th Cir.); *EMW Women's Surgical Ctr. v. Friedlander*, No. 18-6161 (6th Cir. 2018) (challenge to medically unnecessary Kentucky laws that require abortion providers maintain written transfer agreements with a local hospital and ambulance services); *Planned Parenthood of Ind. & Ky., Inc. v Marion Cty. Prosecutor*, No. 20-2407 (7th Cir. 2020) (challenge to Indiana law requiring physicians to report "all abortion complications"); *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213 (E.D. Ark. 2019), *appeal filed*, No. 19-2690 (8th Cir.) (challenge to Arkansas requirement that all abortion providers be board-certified or board-eligible obstetrician-gynecologists); *Gee v. Planned Parenthood Gulf Coast*, No. 18-30699 (5th Cir.) (challenge to Louisiana's inaction on and attempt to force Planned Parenthood providers out of the state Medicaid program).

15 *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973 (7th Cir. 2019) (challenge to Indiana law requiring notice to parents of a minor who has already been found mature enough by a court to decide to have an abortion), *cert. granted, judgment vacated sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 19-816, 2020 WL 3578672 (U.S. July 2, 2020); *Reproductive Health Services v. Bailey*, No. 17-13561 (11th Cir.) (challenging a part of an Alabama parental-consent law requiring the court allow the district attorney and minor's parents to participate in the judicial bypass proceedings).

16 *See* CENTER FOR REPRODUCTIVE RIGHTS, WHAT IF ROE FELL? (2018), https://www.reproductiverights.org/what-if-roe-fell.

17 *See* Josh Salman & Kevin McCoy, *Supreme Court nominee Amy Coney Barrett signed 2006 anti-abortion ad in Tribune*, SOUTH BEND TRIBUNE (Oct. 2, 2020), https://www.southbendtribune.com/news/local/supreme-court-nominee-amy-coney-barrett-signed-2006-anti-abortion-ad-in-tribune/article_bbecc3e4-042c-11eb-b1a2-132bb4b716bb.html (providing copy of original ad).

18 *See* Amy Coney Barrett & John H. Garvey, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 316 (1998).

19 *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532 (7th Cir. 2018); *but see Price v. City of Chicago*, 915 F.3d 1107 (7th Cir. 2019), *cert. denied*, No. 18-1516, 2020 WL 3578739 (July 2, 2020) (signing onto an opinion upholding a buffer zone around an abortion clinic protecting patients from anti-abortion protestors because of direct Supreme Court precedent, but providing a roadmap of how to overturn that precedent).

20 *See* Amy Coney Barrett, *Precedent & Jurisprudential Disagreement*, 91 TX. L. REV. 1711 (2013).

21 *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), as revised (June 27, 2016).

22 *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), as revised (June 27, 2016) (Alito, J., dissenting joined by Chief Justice Roberts).

23 *Hopkins v. Jegley*, 968 F.3d 912, 916 (8th Cir. 2020) ("Chief Justice Roberts . . . emphasized the 'wide discretion' that courts must afford to legislatures in areas of medical uncertainty. As a result, we vacate the district court's preliminary injunction and remand for reconsideration in light of Chief Justice Roberts's separate opinion in *June Medical*, which is controlling[.]").

24 *See* Brief for National Women's Law Center and 72 Additional Organizations Committed to Equality and Economic Opportunity for Women as Amici Curiae supporting June Medical Services, L.L.C., *June Med. Servs.* V. Russo, Nos. 18-1323, 18-1460 (S. Ct. Dec. 2, 2019); DIANA GREENE FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING — OR BEING DENIED — AN ABORTION (2020).

25 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).